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Kagatree a/p Pechi v Public Prosecutor and another appeal

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NOS A-05(M)-173–06 OF 2020 AND A-05(M)-180–06 OF 2020
HAS ZANAH MEHAT, AHMAD NASFY AND NORDIN HASSAN JJCA
16 FEBRUARY 2023

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Criminal Procedure — Appeal — Appeal against conviction and sentence — Appellants charged for murder under s 302 of the Penal Code read together with s 34 of same Code — Appellants convicted and sentenced to death — Whether prima facie case had been established and prosecution had proven its case beyond any reasonable doubt — Whether there was common intention — Whether principle of 'last seen together' was wrongly applied — Whether circumstantial evidence established against appellants — Whether first appellant owed no duty to save victim — Whether trial judge erred in making material inferences and presumptions that were in favour of prosecution and failed to give benefit of doubt to first appellant — Whether trial judge failed to consider unsworn statement of second appellant — Penal Code ss 34 & 302

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Kagatree d/o Pechi ('the first appellant') and Murugan s/o Perumal ('the second appellant') were convicted by the High Court for the offence of murder of Ng Poh Tim ('the victim'), an offence punishable under s 302 of the Penal Code ('the PC') read together with s 34 of the same Code. On 27 June 2016, at about 3pm, the victim's daughter when returning from school, noticed that the gate of her house at No 2 was open. Upon entering the house, she found the house was ransacked and coins were scattered on the floor. She then tried to locate the victim in the house but failed. She was terrified and immediately telephoned her father ('PW10') informing him of the situation. PW10 then arrived at the house and searched for the victim at the said house and another house of his, at No 19, which was in front of their house. Upon searching the upper floor of house No 19, SP10 found the victim was motionless with her mouth gagged tightly with black cellophane tape. The victim's wrists and ankles were also bound with cellophane tape. PW10 untied the victim and brought her to the hospital but the victim was pronounced dead. PW10 also realised that many of his and her daughter's belonging as well as other household items in house No 2 were missing. He reported this to the police in his police report. A post mortem was carried out and it was concluded that the cause of death was asphyxia due to smothering. The prosecution tendered CCTV recordings that showed the victim entered house No 19, later followed by the first appellant and a man. However, only the first appellant and the man left the said house No 19. The first appellant went into house No 2 and then left the place with the man on a motorcycle. Subsequently, the appellants were arrested at a house in Sungai

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Petani. The first appellant showed the police the spot where the items were thrown. Further, the second appellant brought the police to the same house at Sungai Petani and showed the police a T-shirt that he said was worn by him during the incident at the victim's place. The man in the CCTV recording was seen wearing a similar T-shirt shown by the second appellant to the police. The appellants was charged for murder and the trial judge found that the prosecution had established a prima facie case against both the appellants. The first appellant gave her evidence on oath. In essence, her defence was that she did not murder the victim or conspire with anybody to commit the murder. On the other hand, the second appellant gave an unsworn statement from the dock and denied committing the offence of murder of the victim. The trial judge found that both appellants had failed to raise a reasonable doubt on the prosecution case. As such, both the appellants were convicted for the offence of murder of the victim and were sentenced to a mandatory death sentence. Hence, these appeals by the appellants.

Held, dismissing the appeal:

(1) The evidence led by the prosecution based on strong circumstantial evidence had proved that the second appellant had intentionally caused the injury to the victim with the common intention of the first appellant, which in the ordinary course of nature would cause death. Clause (c) of s 300 of the PC was applicable and the prosecution had succeeded in proving this clause to prove the offence of murder against the victim. The decision of the trial judge that the prosecution had proved a prima facie case at the end of the prosecution case on maximum evaluation was correct and there was no reason to interfere in the findings of fact based on the credibility of prosecution's witnesses. Next, the first appellant denied committing the offence and shifted the blame to a person known as Raja. The character of Raja was never raised during the investigation or at the prosecution stage. It was only raised at the defence stage. In the circumstances, the trial judge was entitled to make a finding that the defence was an afterthought. The defence of the first appellant had not raised any reasonable doubt. The second appellant's defence was a mere denial. The defence did not answer the prosecution case, including the second appellant depicted in the CCTV recording wearing the same T-shirt that the second appellant showed to the police in the rented house in Sungai Petani. The trial judge correctly evaluated the defence of the second appellant and found that the defence had also failed to raise any reasonable doubt (see paras 34, 36–38 & 41–42).

(2) There was a common intention by the appellants which resulted in the death of the victim. This attracted the offence of murder by both the appellants punishable under s 302 of the PC. Although at the end of the prosecution case, the trial judge did not state whether the common intention had been established, the law was trite that at the appeal stage,

the court may review the evidence and determine whether common intention had been proven. In the circumstances, the contention that there was no common intention to murder by both the appellants was bereft of any merit (see paras 52–54).

(3) The evidence of 'last seen together' was not the only evidence presented by the prosecution. There was ample other evidence produced before the court to show the first appellant's common intention with the second appellant's in the offence of murder against the victim. Further, the time gap between the appellants' last seen with the victim alive was only a short while before PW10 found the victim motionless in house No 19. The trial judge was not wrong in applying the doctrine of 'last seen together' against the appellants (see paras 59–60).

(4) There was ample circumstantial evidence tendered in court by the prosecution where its cumulative effect had established a case against the appellants beyond a reasonable doubt. The DNA and fingerprint evidence were only corroborative evidence and its absence would not affect the prosecution's case if there was other evidence to establish its case. The available circumstantial evidence was not in favour of the first appellant's innocence. The circumstantial evidence had proved the case for the prosecution against the appellants, and therefore, the appellants' contention on this issue was untenable (see paras 65–67).

(5) The charge against the appellants was for the offence of murder with the common intention of both of them. What was important was the prosecution had established its case against both appellants based on the strong circumstantial evidence. The omission to report to the police or take any action to save the victim would only add another piece of circumstantial evidence against the first appellant as that would be the reasonable action to be taken unless the first appellant participated in the offence. The issue raised by the first appellant did not have any material weight that affected the prosecution's case (see paras 69–70).

(6) The inferences made by the trial judge were reasonable and logical. The inferences were made based on the proven facts in this case. The trial judge had made inferences that were in favour of the prosecution. There were no two or more inferences that could reasonably be made from the proven facts in this case and as such, the inferences in favour of the first appellant did not arise (see paras 73 & 75).

(7) The trial judge did consider the unsworn statement of the second appellant in sufficient detail. The contention of the second appellant was without basis (see para 76).

A **[Bahasa Malaysia summary**

Kagatree a/p Pechi ('perayu pertama') dan Murugan a/l Perumal ('perayu kedua') telah disabitkan oleh Mahkamah Tinggi atas kesalahan membunuh Ng Poh Tim ('mangsa'), suatu kesalahan boleh dihukum di bawah s 302 Kanun Keseksaan ('KK') dibaca bersama dengan s 34 Kanun yang sama. Pada 27 Jun 2016, kira-kira jam 3 petang, anak perempuan mangsa ketika pulang dari sekolah, menyedari pintu pagar rumahnya di No 2 terbuka. Apabila memasuki rumah, dia mendapati rumah itu digeledah dan syiling bertaburan di atas lantai. Dia kemudian cuba mengesan mangsa di dalam rumah tetapi gagal. Dia ketakutan dan segera menelefon bapanya ('PW10') memaklumkan keadaan itu. PW10 kemudian tiba di rumah dan mencari mangsa di rumah tersebut dan sebuah lagi rumahnya, di No 19, yang terletak di hadapan rumah mereka. Ketika menggeledah tingkat atas rumah No 19, SP10 mendapati mangsa tidak bergerak dengan mulut tersumbat dengan pita selofan hitam. Pergelangan tangan dan buku lali mangsa turut diikat dengan pita selofan. PW10 membuka ikatan mangsa dan membawanya ke hospital tetapi mangsa disahkan meninggal dunia. PW10 juga menyedari bahawa banyak barang miliknya dan anak perempuannya serta barangan rumah lain di rumah No 2 hilang. Dia melaporkan perkara ini kepada polis dalam laporan polisnya. Bedah siasat telah dijalankan dan disimpulkan bahawa punca kematian adalah asfiksia akibat tercekik. Pihak pendakwaan mengemukakan rakaman CCTV yang menunjukkan mangsa memasuki rumah No 19, kemudian diikuti oleh perayu pertama dan seorang lelaki. Bagaimanapun, hanya perayu pertama dan lelaki itu meninggalkan rumah No 19 tersebut. Perayu pertama masuk ke rumah No 2 dan kemudian meninggalkan tempat itu bersama lelaki itu menaiki motosikal. Selepas itu, perayu-perayu telah ditangkap di sebuah rumah di Sungai Petani. Perayu pertama menunjukkan kepada polis tempat di mana barang-barang itu dibuang. Selanjutnya, perayu kedua membawa polis ke rumah yang sama di Sungai Petani dan menunjukkan kepada polis sehelai baju-T yang menurutnya dipakai olehnya semasa kejadian di tempat mangsa. Lelaki dalam rakaman CCTV itu dilihat memakai baju-T serupa yang ditunjukkan oleh perayu kedua kepada polis. Perayu-perayu didakwa atas tuduhan membunuh dan hakim bicara mendapati pihak pendakwaan telah membuktikan kes prima facie terhadap kedua-dua perayu. Perayu pertama memberikan keterangannya secara bersumpah. Pada dasarnya, pembelaannya ialah dia tidak membunuh mangsa atau bersubahat dengan sesiapa pun untuk melakukan pembunuhan itu. Sebaliknya, perayu kedua memberi akuan tidak bersumpah daripada kandang tertuduh dan menafikan melakukan kesalahan membunuh mangsa. Hakim bicara mendapati kedua-dua perayu gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Oleh yang demikian, kedua-dua perayu telah disabitkan atas kesalahan membunuh mangsa dan dijatuhkan hukuman mati mandatori. Oleh itu, rayuan-rayuan ini oleh perayu-perayu.

Diputuskan, menolak rayuan: A

(1) Keterangan yang diketuai oleh pihak pendakwaan berdasarkan keterangan mengikut keadaan yang kukuh telah membuktikan bahawa perayu kedua telah dengan sengaja menyebabkan kecederaan kepada mangsa dengan niat bersama perayu pertama, pada lazimnya bagi B menyebabkan kematian. Klausa (c) s 300 KK adalah terpakai dan pihak pendakwaan telah berjaya membuktikan klausa ini untuk membuktikan kesalahan membunuh terhadap mangsa. Keputusan hakim bicara bahawa pihak pendakwaan telah membuktikan kes prima facie pada akhir kes pendakwaan pada penilaian maksimum adalah betul dan tidak C ada sebab untuk campur tangan dalam penemuan fakta berdasarkan kredibiliti saksi pendakwaan. Seterusnya, perayu pertama menafikan melakukan kesalahan itu dan mengalihkan kesalahan kepada seseorang yang dikenali sebagai Raja. Watak Raja tidak pernah dibangkitkan semasa siasatan mahupun di peringkat pendakwaan. Ia hanya D dibangkitkan di peringkat pembelaan. Dalam keadaan itu, hakim bicara berhak membuat keputusan bahawa pembelaan itu adalah sesuatu yang difikirkan kemudian. Pembelaan perayu pertama tidak menimbulkan sebarang keraguan munasabah. Pembelaan perayu kedua adalah penafian semata-mata. Pihak pembelaan tidak menjawab kes pendakwaan, E termasuk perayu kedua yang digambarkan dalam CCTV memakai baju-T sama yang ditunjukkan oleh perayu kedua kepada polis di rumah sewa di Sungai Petani itu. Hakim bicara dengan betul menilai pembelaan perayu kedua dan mendapati pembelaan juga gagal menimbulkan sebarang keraguan munasabah (lihat perenggan 34, 36–38 & 41–42). F

(2) Terdapat niat bersama oleh perayu yang mengakibatkan kematian mangsa. Ini menarik kesalahan pembunuhan oleh kedua-dua perayu yang boleh dihukum di bawah s 302 KK. Walaupun pada akhir kes pendakwaan, hakim bicara tidak menyatakan sama ada niat bersama G telah diwujudkan, undang-undang adalah mantap bahawa pada peringkat rayuan, mahkamah boleh menyemak keterangan dan menentukan sama ada niat bersama telah dibuktikan. Dalam keadaan tersebut, pertikaian bahawa tiada niat bersama untuk membunuh oleh kedua-dua perayu telah kehilangan sebarang merit (lihat H perenggan 52–54).

(3) Keterangan 'terakhir dilihat bersama' bukanlah satu-satunya keterangan yang dikemukakan oleh pihak pendakwaan. Terdapat banyak keterangan lain yang dikemukakan di hadapan mahkamah untuk menunjukkan niat bersama perayu pertama dengan perayu kedua dalam kesalahan I membunuh terhadap mangsa. Seterusnya, jurang masa antara kali terakhir perayu dilihat dengan mangsa masih hidup hanya seketika sebelum PW10 mendapati mangsa tidak bergerak di rumah No 19. Hakim bicara tidak salah dalam menggunakan doktrin 'terakhir dilihat

bersama' terhadap perayu (lihat perenggan 59–60).

(4) Terdapat banyak keterangan mengikut keadaan yang dikemukakan di mahkamah oleh pihak pendakwaan di mana kesan kumulatifnya telah membuktikan kes terhadap perayu-perayu melampaui keraguan munasabah. Bukti DNA dan cap jari hanyalah keterangan yang menyokong dan ketiadaannya tidak akan menjejaskan kes pendakwaan jika terdapat keterangan lain untuk membuktikan kesnya. Keterangan keadaan yang ada tidak memihak kepada ketidakbersalahan perayu pertama. Keterangan mengikut keadaan telah membuktikan kes untuk pendakwaan terhadap perayu, dan oleh itu, pertikaian perayu mengenai isu ini tidak dapat dipertahankan (lihat perenggan 65–67).

(5) Pertuduhan terhadap perayu adalah bagi kesalahan membunuh dengan niat bersama kedua-duanya. Apa yang penting ialah pihak pendakwaan telah membuktikan kesnya terhadap kedua-dua perayu berdasarkan keterangan keadaan yang kukuh. Ketiadaan untuk melaporkan kepada polis atau mengambil sebarang tindakan untuk menyelamatkan mangsa hanya akan menambah satu lagi keterangan mengikut keadaan terhadap perayu pertama kerana itu adalah tindakan munasabah yang perlu diambil melainkan perayu pertama mengambil bahagian dalam kesalahan itu. Isu yang dibangkitkan oleh perayu pertama tidak mempunyai sebarang berat material yang menjejaskan kes pendakwaan (lihat perenggan 69–70).

(6) Inferens yang dibuat oleh hakim bicara adalah munasabah dan logik. Inferens dibuat berdasarkan fakta yang terbukti dalam kes ini. Hakim bicara telah membuat kesimpulan yang memihak kepada pihak pendakwaan. Tiada dua atau lebih inferens yang boleh dibuat secara munasabah daripada fakta terbukti dalam kes ini dan oleh itu, inferens yang memihak kepada perayu pertama tidak timbul (lihat perenggan 73 & 75).

(7) Hakim bicara telah mempertimbangkan pernyataan tidak bersumpah perayu kedua dengan cukup terperinci. Pertikaian perayu kedua adalah tanpa asas (lihat perenggan 76).]

Cases referred to

Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 75, FC (refd)

Dato Mokhtar bin Hashim & Anor v PP [1983] 2 MLJ 232; [1983] 2 CLJ 10, FC (refd)

Dato' Seri Anwar bin Ibrahim v PP [2014] 3 MLJ 774; [2015] 2 CLJ 145, FC (refd)

Farose bin Tamure Mohamad Khan v PP and other appeals [2016] 6 MLJ 277; [2016] 9 CLJ 769, FC (refd)

Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265; [1994] 2 CLJ 151, SC (refd)
Lee Ah Seng & Anor v PP [2007] 6 MLJ 1; [2007] 5 CLJ 1 (refd)
Low Kian Boon & Anor v PP [2010] 4 MLJ 425; [2010] 5 CLJ 489, FC (refd)
Mohd Shawal bin Abdullah v Pendakwa Raya (Criminal Appeal No K-05(M)-160–04 of 2016) (unreported), CA (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)
Salem ak Brayon v PP [2023] 1 MLJ 441; [2022] 1 LNS 2917, CA (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
Teng Howe Seng v PP [2009] 3 MLJ 46, FC (refd)
Tham Kai Yau & Ors v PP [1977] 1 MLJ 174, FC (refd)
Virsa Singh v State of Punjab AIR 1958 465, SC (refd)
Zulkiple bin Mohamad v PP [2022] 1 MLJ 479; [2022] 1 CLJ 673, FC (refd)

Legislation referred to

Penal Code ss 34, 300, 300(c), 302

Appeal from: *Public Prosecutor v Kagatree a/p Pechi & Anor* [2020] MLJU 1746 (High Court, Taiping)

P Ravee (with R Pavithira) (P Ravee & Co & Nurul & Charan) for the appellant.
Mohd Khushairy bin Ibrahim (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent

Nordin Hassan JCA (delivering judgment of the court):

[1] Kagatree d/o Pechi, the first appellant, and Murugan s/o Perumal, the second appellant, were convicted by the Taiping High Court for the offence of murder of one Ng Poh Tim ('the victim'), an offence punishable under s 302 of the Penal Code read together with s 34 of the same Code. The appellants were then sentenced to death for the offence.

[2] The charge preferred against the appellants by the prosecution was as follows:

> Bahawa kamu dengan niat bersama pada 27.6.2016, jam lebih kurang 4.00 petang, bertempat di rumah alamat No. 19, Lorong 7A Taman Kota Jaya, Simpang, Taiping, di dalam Daerah Larut Matang, dalam Negeri Perak, telah membunuh NG POH TIM, No. kp: 670221-10-6198, dan dengan itu kamu, telah melakukan kesalahan membunuh yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan dan dibaca bersama di bawah seksyen 34 Akta yang sama.

A **[3]** Aggrieved with the decision of the High Court, the appellants filed an appeal to this court against the conviction and sentence.

THE PROSECUTION CASE

B **[4]** The narrative of the prosecution case from the evidence adduced during the trial is as follows. On 27 June 2016, at about 3pm, the victim's daughter, Lim Yee Wei ('PW8'), when returning from school, noticed that the gate of her house No 2, Lorong 7A, Taman Kota Jaya, Simpang, Perak was open. Upon entering the house, she found the house was ransacked and coins were scattered C on the floor. She then tried to locate the victim in the house but failed. She was terrified and immediately telephoned her father, Lim Eng Kiat ('PW10'), informing him of the situation.

D **[5]** PW10 then arrived at the house and searched for the victim at the said house and another house of his, at No 19, which was in front of house No 2. house No 19 was vacant and meant to be rented out. When his search was futile, PW10 reported the matter to the police at Simpang Polis Station, where he was advised by the police to return home and to search thoroughly for his E wife. PW10 then went home and continued his search at house No 19. Upon searching the upper floor of house No 19, SP10 found the victim was motionless with her mouth gagged tightly with black cellophane tape. The victim's wrists and ankles were also bound with cellophane tape. Using a scissor, PW10 untied the victim and brought her to Hospital Raja Permaisuri Bainun, F Ipoh, Perak. However, at the hospital, the victim was pronounced dead.

[6] PW10 also realized that many of his and her daughter's belonging as well as other household items in house No 2 were missing. He reported this to the police in his police report dated 3 July 2016, Taiping police report, No G 005575/16.

[7] A post mortem was then carried out on the victim's body by Dr Siti Zanariah bt Md Naziri (PW6) who concluded that the cause of death was H asphyxia due to smothering.

[8] The prosecution also tendered CCTV recordings, which were the CCTV from a neighbour's house (P29) and CCTV from house No 2 (P55, P56, P57, and P58). The recordings, clearly show the first appellant going back I and forth between house No 2 and house No 19. It also showed the first appellant rushing into and out of house No 2. Pertinently, there was a recording that shows the victim entered house No 19, later followed by the first appellant and a man. However, only the first appellant and the man left the said house No 19. The first appellant went into house No 2 and then left the place with the

man on a motorcycle. The man was wearing a T shirt. There was also footage of a motorcycle used at the material time bearing registration No AJY 7537.

[9] PW10 also testified that house No 19 was also his house which was meant to be rented out. house No 19 and house No 2 were in front of each other and divided by a road at Taman Kota Jaya, Simpang, Taiping. PW10 was also informed by the victim that she will get a cleaner to clean house No 19 before it was rented out.

[10] Moving on, the investigating officer, PW16, went to both houses after the incident. He noticed that house No 2 was ransacked and was informed by PW10 that many of his daughter's and the victim's belongings were missing as well as a CCTV decoder in the said house.

[11] Thereafter, based on information received by PW16 of the whereabouts of both appellants, on 11 July 2016, at about 9pm, PW16 sent his team to make an observation of a house at No 101, Jalan Anggerik, Taman Angerik, Aman Jaya, Sungai Petani, Kedah. Having been informed that the appellants were in the house compound, PW16 headed a team and raided the house where the appellants were then arrested. In the main bedroom of the house, the following items were found:

(a) a Rado wristwatch;

(b) an Asus handphone with a simcard;

(c) a white electronic dictionary;

(d) a white Samsung handphone;

(e) a white helmet with a visor;

(f) a black helmet with a visor;

(g) a blue short sleeve shirt;

(h) a black long pants;

(i) a short sleeve collar T-shirt; and

(j) a black short pants.

[12] The police also confiscated a motorcycle bearing registration No AJY 7537 from the house's compound.

[13] Next, the first appellant informed PW16 that she can show the police the place where other items that were taken from house No 2 in Taiping which were thrown away by the first and second appellants. The items were placed in a blue plastic bag and thrown in bushes on the roadside at Jalan Tekkah Permai,

Taman Tekkah Permai, Aulong, Taiping. The first appellant then brought PW16 and his team to the location and showed them the spot where the items were thrown. Upon searching the spot shown by the first appellant, PW16 found a big blue plastic bag that contained the following items:

(a) a brown sling bag;
(b) a digital video decoder;
(c) a silver electronic gadget;
(d) a Samnio culcalator;
(e) a wallet;
(f) a dark blue Tab cover;
(g) two bunch of keys;
(h) two house fence remote control;
(i) one Rado wristwatch chain;
(j) the victim's MyKad;
(k) the victim's driving license;
(l) the victim's vocational license;
(m) the victim's CIMB preferred card;
(n) the victim's Public Bank credit card;
(o) a CIMB ATM card;
(p) an RHB ATM card;
(q) PW10 Bonus Link card;
(r) PW8 Popular student card;
(s) the victim's 'the Store' card;
(t) the victim's Smart Assist Perdua card;
(u) the victim's Aeon card;
(v) a TESCO card;
(w) PW8 school's card;
(x) a resit;
(y) the victim's water bill; and
(z) a water bill under the name of PW10 and the victim's company.

[14] Further, on 20 July 2016, the second appellant brought the police to the

same house at Sungai Petani and showed the police a T-shirt that he said was worn by him during the incident at the victim's place. The man in the CCTV recording was seen wearing a similar T-shirt shown by the second appellant to the police.

[15] Next, upon further investigation, it was found that the motorcycle bearing registration AJY 7537, confiscated from the house at Sungai Petani, was registered under the first appellant's name.

[16] PW10 and PW8 then identified the victim's and their belongings that were found at the house in Sungai Petani and the place shown by the first appellant at Taman Tekkah, Aulong, Taiping.

THE DECISION OF THE TRIAL JUDGE AT THE CLOSE OF THE PROSECUTION CASE

[17] Having considered the prosecution evidence on maximum evaluation and credibility of prosecution witnesses, the trial judge found that the prosecution has established a prima facie case against both the appellants on the charge preferred against them. This was stated in the notes of proceedings in the following words:

> Keputusan di akhir kes Pendakwaan
>
> Setelah membuat penilaian maksima ke atas kes Pendakwaan yang dikemukakan melalui keterangan saksi dan ekshibit-ekshibit dan membuat penilaian ke atas kredibiliti kesemua saksi-saksi bagi pihak pendakwaan, Mahkamah mendapati dan memutuskan bahawa pihak pendakwaan telah berjaya membuktikan kes prima facie seperti mana pertuduhan. Dengan itu kedua-dua OKT dipanggil untuk membela diri.

[18] The trial was then continued by another trial judge as the previous trial judge was transferred out from High Court Taiping. In this regard, both the deputy public prosecutor and the defence counsel had no objection to the trial being continued and presided over by a new trial judge. They also indicated that no recalling of witnesses was to be made.

THE DEFENCE

The first appellant

[19] The first appellant gave her evidence on oath. In essence, her defence was that she did not murder the victim or conspire with anybody to commit the murder. She was at the place of the incident to clean house No 19 upon request by the victim. During her lunch break, she went to see her boyfriend known as 'Raja' as Raja wanted to borrow her motorcycle. Raja then sent the first

appellant back to house No 19 to continue with her cleaning work and left the place. About ten minutes later, Raja returned to the house and asked for money from the first appellant. As the first appellant had no money to give Raja, she asked the victim whether the victim can give her money. The victim responded that she will give the money after the first appellant had completed the cleaning work. The first appellant then continued with her work whilst Raja assisted the victim to repair the faulty hose upstairs. Thereafter, the first appellant heard the victim shout and when the first appellant went upstairs, she saw Raja holding the victim and tying her hands. Raja also threatened the first appellant.

[20] Raja then instructed the first appellant to take things from house No 2 which she acceded and took several items from the house including handphones, a handbag, and a CCTV decoder. Raja and the first appellant then left the place in the first appellant's motorcycle. They then proceeded to Raja's rented house at Taiping Garden.

[21] The first appellant admitted that she told the police the whereabouts of the items in a blue plastic bag found at Taman Tekkah, Taiping but explained that the plastic bag and its contents were thrown by Raja at the place in the presence of the first appellant.

The second appellant defence

[22] On the other hand, the second appellant gave an unsworn statement from the dock ('D1').

[23] The second appellant denies committing the offence of murder of the victim. On 27 June 2016, the date of the incident, the second appellant did not even know the first appellant. The second appellant only knew the first appellant at end of June 2016 when she asked him to find a house for her to rent. The second appellant also denied that he was the man in the CCTV recordings and did not show the police any items confiscated by the police.

The decision of the trial judge at the end of the case

[24] Considering the evidence presented by the defence including the unsworn statement of the second appellant, and the totality of the evidence in this case, the trial judge found that both appellants have failed to raise a reasonable doubt on the prosecution case. As such, both the appellants were convicted for the offence of murder of the victim and were sentenced to a mandatory death sentence.

THE ISSUES RAISED BY THE APPELLANTS BEFORE THIS COURT

[25] In challenging the decision of the trial judge, the appellants in their written and oral submissions raised the following issues before us:

(a) common intention has not been established by the prosecution between the first and the second appellants to murder the victim;

(b) the principle of 'last seen together' was wrongly applied by the trial judge;

(c) the circumstantial evidence before the court was in favour of the first appellant;

(d) the first appellant owes no duty to save the victim at the material time;

(e) the trial judge erred in making material inferences and presumptions that were in favour of the prosecution and failed to give the benefit of the doubt to the first appellant.

(f) the trial judge erred in concluding that the prosecution has established its case on available circumstantial evidence; and

(g) the trial judge has failed to consider the unsworn statement of the second accused.

THE ANALYSIS AND DECISION OF THIS COURT

[26] To begin with, it is pertinent for this court to analyse the evidence in totality in considering whether at the end of the prosecution case, a prima facie case had been established and at the end of the case the prosecution had proven its case beyond any reasonable doubt.

[27] In the present case, to establish a prima facie case for an offence of murder punishable under s 302 of the Penal Code, the ingredients to be proved by the prosecution are the death of the victim, the victim died as a result of the injuries suffered, the injuries were caused by the appellants in furtherance of their common intention and the appellant's act comes within one or a combination of the limbs under s 300 of the Penal Code.

[28] For ease of reference, s 300 of the Penal Code provides:

> Except in the cases hereinafter excepted, *culpable homicide is murder* —
>
> (a) if the act by which the death is caused is done with the intention of causing death;
>
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;

(c) *if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death;* or

(d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid. (Emphasis added.)

[29] The prosecution, in this case, is relying on cl (c) of s 300 of the Penal Code that the appellant intentionally caused bodily injuries to the deceased which is sufficient in the ordinary course of nature to cause death.

[30] As regards this cl 300(c) of the Penal Code, it is trite that the prosecution has to prove firstly, that the appellant, intentionally caused the injury to the victim, and secondly, the injury caused is sufficient in the ordinary course of nature to cause death. The intention to cause death is not an ingredient to be proved for the application of cl 300(c) (see *Virsa Singh v State of Punjab* AIR 1958 465; *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC)).

[31] In a recent Federal Court case of *Zulkiple bin Mohamad v Public Prosecutor* [2022] 1 MLJ 479; [2022] 1 CLJ 673, the elements to be proved for the application of cl (c) of s 300 was reiterated as follows:

> [28] The elements that the prosecution needs to prove in order to establish a case under cl (3) of s 300 of the Indian Penal Code, which corresponds with cl (c) of s 300 of our Penal Code, were spelt out by Vivian Bose J in *Virsa Singh* and they are as follows:
>
> (i) it must be established that a bodily injury is present;
>
> (ii) the nature of the injury must be proved;
>
> (iii) it must be proved that *there was an intention to inflict that particular bodily injury,* that is to say, that it was not accidental or unintentional, or that some other kind of injury was intended; and
>
> (iv) it must be proved that the injury of the type described, made up of the three elements set out above, *is sufficient to cause death in the ordinary course of nature.* (Emphasis added.)

[32] The Federal Court in the same case explained extensively the burden to prove intention under cl (c) of s 300 and its application in the following manner:

> [50] It follows that where the case falls under cl (c) of s 300 of the Penal Code, there is no requirement for the prosecution to prove intention to cause death under cl (a), or knowledge of the likelihood of death under cl (b) or knowledge of the imminent danger of the act under cl (d). *What the prosecution needs to prove in order to bring the*

case under cl (c) of s 300 is to show that the injury proved to be present was caused intentionally and not accidentally and that the injury was sufficient in the ordinary course of nature to cause death.

[51] We need to come back to *Virsa Singh* to hopefully clear the point beyond controversy. In that case, counsel for the appellant had in fact argued that the 'intention' that cl (c) of the Indian Penal Code requires must be related not only to the bodily injury inflicted but also to the clause 'and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death'. The Supreme Court disagreed and the reason for its disagreement was this: This is a favourite argument in this kind of case but is fallacious. If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, the thirdly would be unnecessary because the act would fall under the first part of the section, namely:

> If the act by which the death is caused is done with the intention of causing death.

[52] This exposition by the Supreme Court dispels any notion that under cl (c) of s 300 of the Penal Code*, the prosecution is required to prove that the bodily injury intended to be inflicted was intended to cause death in the ordinary course of nature. The only requirement under cl (c) is for the prosecution to prove that the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.*

[53] *The 'intention' or the mens rea element of murder under cl (c) of* s 300 of the Penal Code must not be coalesced with the 'intention' or the mens rea element of murder under cl (a). Under cl (a), death is the intended consequence and death results as intended, whereas under cl (c), death is not the intended consequence but death results, not because death is intended but because the bodily injury intended to be inflicted is of a kind that is sufficient in the ordinary course of nature to cause death. (Emphasis added.)

[33] Further, it is trite that the element of intention cannot be proved by direct evidence but could be inferred from the appellant's act and the surrounding circumstances (see *Tham Kai Yau & Ors v Public Prosecutor* [1977] 1 MLJ 174 (FC); *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232; [1983] 2 CLJ 10 (FC); *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265; [1994] 2 CLJ 151 (SC); *Mohd Shawal bin Abdullah v Pendakwa Raya* (Criminal Appeal No K-05(M)-160–04 of 2016) (unreported) (CA)).

[34] Reverting to the present case, we find the evidence led by the prosecution based on strong circumstantial evidence has proved that the second appellant had intentionally caused the injury to the deceased with the common intention of the first appellant, which in the ordinary course of nature would cause death. The evidence of the prosecution's witnesses in particular PW10 and PW6, the CCTV recordings, and the seizure of the items belonging to PW8, PW10, and the victim shown by the first appellant at Taman Tekkah,

Taiping, and a T-shirt worn by the second appellant during the incident which was shown by the second appellant to the police proved this fact.

[35] Further, the pathologist in this case, PW6, testified that the cause of death was asphyxia due to smothering. In her evidence, PW6 explained that the act of closing the victim's nose and mouth simultaneously would cause asphyxia which causes death. In her evidence, this was said:

> Pemeriksaan menunjukkan muka si mati terkongesi dan bengkak dengan bintik-bintik pendarahan. Beliau telah mengalami luka-luka lecet dan lebam di bahagian muka, kedua-dua lengan dan kaki. *Pada pendapat saya, kecederaan ini selaras dengan kecederaan akibat rongga hidung dan mulut ditutup (tekupan). Rongga hidung dan mulut boleh ditutup dengan tangan, kain, bantal dan lain-lain objek yang cukup besar untuk menutup kedu-dua serentak. Perbuatan ini sendiri boleh mengakibatkan si mati mengalami lemas udara ('asfiksia') dan akhirnya membawa kematiannya.* (Emphasis added.)

[36] In the circumstances, we agree that cl (c) of s 300 is applicable and in the present case the prosecution has succeeded in proving this clause to prove the offence of murder against the victim. Again, we are satisfied that the act that in the ordinary course of nature would cause death was inflicted by the second appellant with the common intention of the first appellant.

[37] The other elements of the offence of murder as alluded to earlier were not in dispute and as such, we find that the decision of the trial judge in his finding that the prosecution has proved a prima facie case at the end of the prosecution case on maximum evaluation was correct and there is no reason to interfere in the findings of fact based on the credibility of prosecution's witnesses. Here, the trial judge is in a better position to make the findings of fact as the trial judge has the audio-video advantage over the witnesses.

(see *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236 (FC); *Lee Ah Seng & Anor v Public Prosecutor* [2007] 6 MLJ 1; [2007] 5 CLJ 1 (FC)).

[38] Next, regarding the appellants' defence, the trial judge comprehensively analysed the defence as reflected in the grounds of judgment. As regards the first appellant's defence, essentially, the first appellant denied committing the offence and shifted the blame to a person known as Raja. The character of Raja was never raised during the investigation or at the prosecution stage. It was only raised at the defence stage. In the circumstances, the trial judge is entitled to make a finding that the defence is an afterthought (see *Teng Howe Seng v Public Prosecutor* [2009] 3 MLJ 46; *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 75).

The first appellant's subsequent conduct as mentioned earlier, was found not in her favour by the trial judge. Thus, we agree with the trial judge that the defence of the first appellant has not raised any reasonable doubt.

[39] Reverting to the second appellant, a complete denial of involvement with the offence was advanced by the defence. However, this is also against the weight of strong circumstantial evidence established by the prosecution including the second appellant's conduct in showing the police the T-shirt that he wore during the incident.

[40] Moreover, the second appellant gave an unsworn statement that was not subject to cross-examination by the prosecution or being questioned by the trial judge. The weight to be attached to the evidence is lesser than the evidence given under oath. The assessment of an unsworn statement has been lucidly explained by the Federal Court in *Dato' Seri Anwar bin Ibrahim v Public Prosecutor* [2014] 3 MLJ 774; [2015] 2 CLJ 145 in the following manner:

> [202] We accept that the courts below did not explicitly consider the political conspiracy defence which was raised by the appellant in his unsworn statement from the dock. *In law, a trial judge will not give much weight to what an accused has said in his unsworn statement as he is not subject to cross-examination by the prosecution nor can he be questioned by the trial judge*. (*Lee Boon Gan v Regina* [1954] 1 MLJ 103; [1954] 1 LNS 39; *Udayar Alagan & Ors v Public Prosecutor* [1962] 1 MLJ 39; [1961] 1 LNS 146; *Mohamed Salleh v Public Prosecutor* [1968] 1 LNS 80; [1969] 1 MLJ 104; *Juraimi Husin v Public Prosecutor* [1998] 1 MLJ 537; [1998] 2 CLJ 383).
>
> [203] The issue is did the trial judge and the Court of Appeal adopt the correct principle in assessing the appellant's statement? The trial judge in assessing the appellant's statement observed as follows:
>
> > [196] The accused in this case had denied sodomising the complainant. Although this denial was made from the dock, it was still a denial. He believed the charges against him was made not because the sodomy took place, but to send him into political oblivion by attempting to put him behind bars.
>
> [204] The Court of Appeal after discussing the law on a statement from the dock, agreed with the trial judge that the appellant's statement from the dock was a mere denial. The Court of Appeal observed as follows:
>
> > [108] *For the respondent to succeed in his defence, it is incumbent upon him to adduce evidence which can answer the allegations in the charge.* In this case, the respondent did not even deny that he was at the scene of the crime at the material time and date as stated in the charge. He never disputed that his car was seen entering and leaving the condominium at the material time. He also did not dispute that he was seen entering the lift to the 5th floor of the condominium and later leaving the place. He also did not dispute that he had directed his chief of staff, PW24 to arrange for an envelope to be handed over to him at the said condominium and that PW24 had instructed PW1 to bring the envelope to him. The respondent also did not dispute the fact that PW1 had brought the

envelope to him at the place of the incident. The learned judge found that the respondent's statement from the dock is a mere denial with which we fully agree. The bare denial by the respondent does not amount to any doubt whatsoever. *A credible defence is one that answers the evidence thrown at it by the prosecution. It is also imperative that the respondent explain his case.*

[205] We hold that the Court of Appeal had adopted the right principle in assessing the appellant's statement from the dock. (Emphasis added.)

[41] Reverting to the present case, we agree with the trial judge that the second appellant's defence was a mere denial. The defence did not answer the prosecution case, including the second appellant depicted in the CCTV recording wearing the same T-shirt that the second appellant showed to the police in the rented house in Sungai Petani.

[42] In the circumstances, we find that the trial judge correctly evaluated the defence of the second appellant and found that the defence has also failed to raise any reasonable doubt.

[43] Now, we move to the issues raised by the appellants in this appeal before us.

The issue of common intention between the first and second appellants to murder the victim

[44] Counsel for the second appellant submitted that the trial judge has failed to ascertain in his grounds of judgment when the common intention between the appellants arose to murder the victim. The common intention, if any, was only to rob the victim's house. It was submitted that there was no common intention between the appellants to murder the victim.

[45] Section 34 of the Penal Code provides:

34 When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

[46] It is a trite principle of law that common intention may be inferred from the circumstances of the case and it is not incumbent upon the prosecution to prove that all the accused have the common intention to murder the victim. If it is established that all the accused have a common intention to commit a criminal act that resulted in the commission of theoffence of murder, common intention can operate against all the accused for the murder. What is pertinent is the participation in the criminal act.

[47] The Federal Court in *Farose bin Tamure Mohamad Khan v Public Prosecutor and other appeals* [2016] 6 MLJ 277; [2016] 9 CLJ 769 has explained this principle of law as follows:

> [65] With respect, we are also not persuaded by the two Singapore Court of Appeal authorities cited and argued before us. Despite the lengthy explanation on the issue of common intention in particular in *Daniel Vijay*, *we still hold the view which had been widely accepted by our courts that in a criminal prosecution where s 34 of the Penal Code is invoked, it is not incumbent on the prosecution to prove that there existed between the participants a common intention to commit the crime actually committed. As long as there is a common intention to commit a criminal act, which resulted in the commission of a crime actually committed, s 34 can operate against all persons involved in the commission of the actual crime*.
>
> [66] The existence of a common intention is a question of fact in each case to be proved mainly as a matter of inference from the circumstances of the case. Direct evidence as proof is difficult to procure because the common intention is essentially a state of mind. Invariably inferences have to rely upon arising from such acts or conduct of the accused, the manner in which the accused arrived at the scene, the nature of injury caused by one or some of them, or such other relevant circumstances available. *The totality of the circumstances must be taken into consideration in arriving at a conclusion whether there is a common intention to commit the offence for which the accused could be convicted. The facts and circumstances of each case might vary. As such, each case should be decided based on the facts involved.* (Emphasis added.)

[48] The argument that there was only a common intention to commit robbery and not murder had been raised in several cases before and has been answered by the apex court including in *Farose*'s case and *Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 425; [2010] 5 CLJ 489. In *Low Kian Boon*'s case, all the accused were convicted of murder in furtherance of their common intention although it was argued that their intention was only to rob but resulted in the death of the victim.

[49] The Federal Court in *Low Kian Boon*'s case explained the position of law in the following words:

> [66] The Privy Council in *Mahbub Shah v Emperor* AIR [1945] PC 118 considered *the term 'common intention' as distinguished from 'same intention'*. If the person, party to prior planning is not present to participate in the action, his case cannot be covered under s 34 of the Penal Code. In *Sereekanlal Ramayya Munipalli v State of Bombay* AIR [1955] SC 287, the Supreme Court stated: Lord Sumner's expressed in the Miltonic verse: 'They also serve who only stand and wait' a fortiori embraces cases of common intention, instantly formed triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile needs, some spilling drops of blood. Guilt goes with community of intent coupled with participatory presence or cooperation. No pinery justice niceties can be pressed into service to nullify or jettison the plain punitive purpose of Penal Code.

A [67] *After having given consideration to the elucidatory interpretation given to the words in s 34 we are in agreement with the determination pointedly made by the COA where it is pronounced that:*

> On the facts and circumstances of the present case, *we are satisfied as indeed the learned trial judge was that the first and 4th accused committed the offence of murder with common intention. Their joint presence at the scene and their participation to be inferred from the injuries inflicted on the deceased coupled with their flight from the scene reasonably support the existence of a common intention.* We are conscious that there authorities which state that mere flight or absconding from the scene of the crime is insufficient to infer guilty intention. But if you look all those cases you will find that in each of them, flight was the only circumstance relied upon. That is not so in the present case. There are other facts and circumstances which must be taken together with the flight of both accused from the scene of the crime. (Emphasis added.)

[50] In *Ferose*'s case, the Federal Court accepted the principle of law in *Low Kian Boon*'s case by quoting the relevant reasoning in that case which is as follows:

> [67] In *Low Kian Boon & Anor v Public Prosecutor* [2010] 4 MLJ 425; [2010] 5 CLJ 489 (*Low Kian Boon*) in considering the scope of s 34 of the Penal Code, this court traced the origin of the said provision to the Indian Penal Code. This court in *Low Kian Boon* said that:
>
> > It is not without significance that the original draft of the Indian Penal Code did not contain the phrase 'in furtherance of the common intention of all'. The words were inserted by s 1 of Act xxvii of 1870 (India). When the Indian Penal Code was introduced into the Straits Settlements in 1872 and the Federated and the Unfederated Malay States, the section as amended was also received. Section 33 states that the word 'act' denotes a series of acts as well as a single act; and the word 'omission' denotes a series of omissions as well as a single omission. *It follows that the words in* s 34 'when a criminal act is done by several persons' may be construed to mean 'when criminal acts are done by several persons'. *Thus, where different acts in a criminal enterprise are committed by different participants, such participants may still be regarded as having done 'a criminal act' for the purposes of liability under s 34. The raison d'etre, as it were, of s 34 was to meet the situation where it may be difficult, if not impossible, to distinguish between the acts of each individual member of a party or to prove precisely what part was played by each of them. Section 34 operates to impute liability to a participant whose participation contributed to the result, though he cannot be proved to have committed the actus reus himself* …
>
> [68] The issue as to whether under s 34 of the Penal Code, there must exist a common intention to commit the crime actually committed as decided in the case of *Rex v Vincent Banka & Anor* [1936] 1 MLJ 53; [1936] 1 LNS 62 was considered by this court in *Low Kian Boon*. This court in *Low Kian Boon* said:
>
> > In Vincent Banka, *the two appellants were charged with committing robbery and murder in the course of robbery.* Evidence was inconclusive as to which of the two

appellants had carried the knife or inflicted the fatal wound. They were convicted on both charges and appealed against their convictions for murder. The appeal was allowed, Huggard CJ said at p 69:

> It follows that it is the duty of the trial judge, in cases where s 34 of the Penal Code is relied on, to direct the attention of the jury to any evidence from which they may legitimately infer the existence of a common intention to commit the criminal act actually committed; at the same time making it clear that the question whether or not such common intention existed is a question of fact and is for them to determine.

And at p 70:

> ... under the terms of that section (ie s 34 of the Penal Code) as has already been pointed out, there must exist a common intention to commit the crime actually committed, and it is not sufficient that there should be merely a common intention to 'behave criminally'.

It was clear that the two appellants had set out to commit robbery. Regarding the murder, however, evidence was inconclusive as to who had carried the knife or inflicted the fatal wound. Applying the test enunciated by Huggard CJ, the court held that there must be evidence that there was a common intention between the robbers not merely to commit robbery but also, if necessary, to kill the deceased. *Since there was no evidence of any express agreement between the appellants that a knife should be carried or that the victim should be stabbed, the court convicted them only of robbery and acquitted them of murder.*

[69] *To demonstrate the fallacy in the aforesaid reasoning in Vincent Banka, this court in Low Kian Boon referred to the judgment of Lord Summer in the leading authority of the Privy Council in Barendra Kumar Ghosh v King Emperor* AIR 1925 PC 1: ...

The fallacy in this kind of reasoning was demonstrated by Lord Sumner in *Barendra Kumar Ghosh v Emperor*, the leading Indian authority. The facts were that the appellant, together with a few others, had gone to a Post Office in Bengal to demand money from the sub-postmaster. All of them fired at the sub-postmaster with their pistols. He was hit in two places and died almost instantly. The appellant was arrested after the others fled. The trial judge directed the jury that the appellant might be the man who fired the fatal shot and that if the jury were satisfied that the subpostmaster had been killed in furtherance of the common intention of all, the appellant was guilty of murder whether he fired the fatal shot or not. The appellant was convicted of murder by the jury. Lord Sumner said at pp 5–6 and 9 of the report:

> The appellant's argument is, in brief, that in s 34, 'a criminal act', insofar as murder is concerned, means an act which takes life criminally within s 302, because the section concludes by saying 'is liable for that act in the same manner as if the act were done by himself alone', and there is no act done by himself alone, which could make a man liable to be punished as a murderer, except an act done by himself and fatal to his victim.
>
> Thus, the effect is that, where each of several persons does something criminal, all acting in furtherance of a common intention, each is punishable for what he has done as if he had done it by himself. Such a proposition was not worth

A enacting, for, *if a man has done something criminal in itself, he must be punishable for it, and nonetheless so that others were doing other criminal acts of their own at the same time and in furtherance of an intention common at all …*

B [70] Simply put, *common intention is concerned with the principle of joint liability in penal law*. This principle has been set out in numerous judgments in our jurisdiction. In *Krishna Rao*, the appellants were charged with the murder of four persons in the course of the robbery of a jewelry shop ….

C [71] *The decision of the High Court was affirmed by the Court of Appeal and the Federal Court. The Federal Court approved the trial judge's application of the legal principle relating to* s 34 of the Penal Code (See *Krishna Rao a/l Gurumurthi v Public Prosecutor and another appeal* [2009] 3 MLJ 643; [2009] 2 CLJ 603). *The Federal Court held that having regard to all the circumstances of the case, the theft or burglary or robbery and the murders were an integral part of one and the same transaction. Put differently, the Federal Court held that this was not a case of a mere recovery of recently stolen property from an accused person. There were several other cogent pieces of circumstantial*

D *evidence which go to establish beyond a reasonable doubt that the first and second appellants, in that case, participated in the commission of the murders in the context of* s 302 being read with s 34 of the Penal Code. (Emphasis added.)

E **[51]** In the present case, based on the evidence adduced, the inference of common intention can be drawn from, inter alia, the following facts:

(a) the first appellant was at houses No 2 and 19 at the material time;

(b) the first appellant brought the second appellant on her motorcycle;

F (c) the victim entered house No 19 and later the first and the second appellants entered the house;

(d) the first appellant was then seen in CCTV recording entering house No 2;

G (e) the first appellant's conduct to unplug the CCTV decoder from house No 2 and took it away and throwing it at Taman Tekkah with other looted items.

(f) the first and second appellant left the place of incident on the first

H appellant's motorcycle and the victim was then nowhere to be seen in the CCTV recordings;

(g) shortly after, PW10 found the victim motionless at house No 19 with her mouth, hands, and legs tight with cellophane tape;

I (h) both the appellants were arrested in the second appellant's rented house in Sungai Petani;

(i) the first appellant showed the police the items taken from house No 2 in a blue plastic bag at Taman Tekkah; and

(j) the second appellant showed the police the T-shirt that he wore at the time of the incident in the house at Sungai Petani.

[52] Based on the totality of the evidence before the court and the circumstances of this case, we find there was a common intention by the appellants which resulted in the death of the victim. This attracts the offence of murder by both the appellants punishable under s 302 of the Penal Code Act 574 discussed earlier.

[53] On the same issue, although at the end of the prosecution case, the trial judge did not state whether the common intention has been established, the law is trite that at the appeal stage before us, we may review the evidence and determine whether common intention has been proven. This has also been explained by the Federal Court in *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 where the Federal Court opined as follows:

> [102] *we hold the view that even if the trial judge had failed to mention of any evaluation of common intention in his written grounds of judgment, the Court of Appeal, which in law reheard the case when exercising its appellate function, was empowered and also duty bound to carry out an evaluation exercise to determine whether common intention did exist*. Here the Court of Appeal equally failed to do that. An appeal is a continuation of proceedings by way of rehearing and an appeal court may subject the evidence to a critical re-examination (*Ahmad Najib Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 *Mohamad Deraman v Public Prosecutor* [2011] 3 MLJ 289; [2011] 3 CLJ 601). (Emphasis added.)

[54] In the circumstances, the contention that there was no common intention to murder by both the appellants, we find, is bereft of any merit.

The issue of 'last seen together'

[55] Next, counsel for the first appellant contended that the doctrine of 'last seen together' is not applicable against the first appellant as she was present at the place of the incident upon the request of the victim to clean house No 19. Thus, the first appellant was expected to be with the victim and conclusion cannot be made that she was the one who involved in the murder of the victim.

[56] On this issue, the evidential value of 'last seen together' is, inter alia, to show that there was an opportunity for the person last seen with the victim to commit the offence against the victim. It is corroborative in nature which corroborates the other evidence presented by the prosecution. Consequently, the last person with the accused has to explain his presence with the victim at the material time. This theory or doctrine of last seen together is applicable

especially when the time gap between the accused and the victim were last seen alive was very short which could exclude another person from committing the offence against the victim.

[57] *Sarkar Law of Evidence* (18th Ed, Vol 1) at p 140, states this:

> *The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were last seen alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible.* It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and the possibility of other persons coming in between exist. In absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. The circumstance of last seen together does not by itself and necessarily lead to the inference that the accused who committed the offence ... (Emphasis added.)

[58] In a recent case of *Salem ak Brayon v Public Prosecutor* [2023] 1 MLJ 441; [2022] 1 LNS 2917, this court had the opportunity to deal with the same issue and explained as follows:

> [53] Our attention was drawn to the Indian Supreme Court decision of *Ashok v State of Maharashtra* [2015] 4 Supreme Court 393 where the Supreme Court of India held that:
>
> > The 'last seen together' theory has been elucidated by this court in *Trimukh Marotiu Kirkan v State of Maharashtra* [2006] 10 SCC 106, in the following words:
> >
> > *Where an accused is alleged to have committed the murder of his wife and the prosecution succeeds in leading evidence to show that shortly before the commission of crime they were seen together or the offence takes place in the dwelling home where the husband also normally resided, it has been consistently held that if the accused does not offer an explanation how the wife received injuries or offers an explanation which is found to be false, it is a strong circumstance which indicates that he is responsible for commission of the crime*. Thus, *the doctrine of last seen together shifts the burden of proof on the accused, requiring him to explain how the incident had occurred. Failure on the part of the accused to furnish any explanation in this regard, would give rise to a very strong presumption against him*.
>
> [54] Under the circumstances of this case where, in our view, the 'last seen together' theory applies, the burden shifted to the appellant to proffer a strong and cogent explanation and rebut the presumption that his act or series of acts led to the deceased's death and the inference that he committed the acts. The absence of such an explanation would be detrimental to his defence (see *Nika Ram v State of HP* [1972] 2 SCC 80 *Kanhaiya Lal v State of Rajasthan* [2014] 4 SCC 715). (Emphasis added.)

[59] Reverting to the present case, the evidence of 'last seen together' is not the only evidence presented by the prosecution. There is ample other evidence produced before the court as alluded to earlier, to show the first appellant's common intention with the second appellant's in the offence of murder against the victim. This is reflected in the trial judge's grounds of judgment which, inter alia states:

> [63] To conclude, it was evident that the first accused, Kagatree had committed the crime by participating in it based on the evidence from the CCTV recording, she was the last person markedly seen to be with the deceased. Furthermore, the loot was found in her presence and she was the one who gave directions to where the other stolen items were thrown away ...

[60] Further, the time gap between the appellants' last seen with the victim alive is only a short while before PW10 found the victim motionless in house No 19. we find the trial judge was not wrong in applying the doctrine of 'last seen together' against the appellants.

THE ISSUE OF CIRCUMSTANTIAL EVIDENCE

[61] Counsel for the second appellant then submitted that there was insufficient circumstantial evidence in this case and the trial judge erred in his finding that the prosecution has proved its case based on the circumstantial evidence. It was contended that there was no proof that the second appellant was present at the place of the incident, the second appellant's fingerprint or DNA was not found at the scene of the crime, the seizure of the second appellant's T-shirt shown by him to the police is insufficient proof that he was at the scene of the crime, and the seizures of the items stolen in house No 2 does not prove that the second appellant was involved in the murder of the victim.

[62] On the other hand, counsel for the first appellant submitted that the available circumstantial evidence in this case, is in favour of the first appellant. The reasons for this contention are that the CCTV recordings show that the first appellant was helping the victim to clean house No 19, the CCTV recordings also show that her conduct robbing house No 2 after being threatened by her male friend, the looted items only show that there was no pre-planned or pre-meditated to rob house No 2, no fingerprint or DNA of the first appellant that implicates her with the crime, and the first appellant did not manhandle the victim in the house.

[63] Here, it is trite law that where the prosecution is relying on circumstantial evidence to prove its case, the circumstantial evidence must irresistibly point to one and only one conclusion which is the guilt of the accused and in this case both the appellants (see *Dato Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 (FC)).

[64] On this issue of circumstantial evidence, it is also useful to refresh our memory on the trite principle of law enunciated by our apex courts and one of which is by the Federal Court in the *Low Kian Boon* case where this was said:

> [55] In *Udaipal Singh v State of Uttar Pradesh* AIR [1972] SC 54; [1972] 4 SCC 142, the Supreme Court observed:
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> > (xxi) In cases where only circumstantial evidence is available at the outset one normally starts looking for *motive and the opportunity to commit the crime*. If the evidence shows that the accused having a strong enough motive had the opportunity of committing the crime and the established circumstances on the record considered along with explanation, if any, of the accused exclude the reasonable possibility of any-one else being the real culprit then the chain of evidence can be considered to be so complete so as to show that within all human probability, the crime must have been committed by the accused. *He may in that event, safely be held guilty on such circumstantial evidence.*
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> [56] With the rejection of the existence of Ivan the circumstances in this appeal merit a reflection of the words of Fazal Ali J in delivering the judgment in *Ram Avtar v The State (Delhi Administration)* AIR [1985] SC 1692:
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> > At the very outset we might mention that *circumstantial evidence must be complete and conclusive before accused can be convicted thereon. This, however, does not mean that there is any particular or special method of proof of circumstantial evidence.* We must, however, guard against the danger of not considering circumstantial evidence in its proper perspective, eg, where there is a chain of circumstances linked up with one another, it is not possible for the court to truncate and break the chain of circumstances. *In other words where a series of circumstances are dependent on one another they should be read as one integrated whole and not considered separately, otherwise the very concept of proof of circumstantial evidence would be defeated.* The learned Sessions judge seems *to have fallen* into this very error. In the instant case, instead of taking all the circumstances together, which are undoubtedly circumstantial and closely linked up with one another, the learned Sessions judge has completely misdirected himself by separately dealing with each circumstance thereby making a wrong approach while appreciating the circumstantial evidence produced in the case.
> >
> > ... It is not possible for us to consider the various chains of circumstances, mentioned above, in isolation by divorcing them from the other circumstances which are closely interlinked with them ...
> >
> > *Before concluding we might observe that where circumstantial evidence consists of a chain of continuous circumstances linked up with one another, the court has to take the cumulative effect of the entire evidence led by the prosecution before acquitting or convicting an accused.* (Emphasis added.)
>
> [57] With regard to the question of proof mention could be made of the judicial decision in *Public Prosecutor v Wong Wai Hung & Anor* [1993] 1 SLR 927, Rubin JC stated, inter alia:
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> > *It is trite law that when the prosecution relies wholly on circumstantial evidence, the quantum of proof must be more than mere skeletons*. The first and foremost

principle to be borne in mind when approaching circumstantial evidence is set out in *Idris v Public Prosecutor* [1960] 1 MLJ 296 at p 297 (where Hill Ag CJ quoted with approval the trial judge's summing up to the jury and his quotation of the words of Lord Cairns in *Belhaven & Stenton Peerage* [1875–6] LR 1 App Cas 278 at 279):

> *… in dealing with circumstantial evidence we have to consider the weight which is to be given to the united force of all the circumstances put together. You may have a ray of light so feeble that by itself it will do little to elucidate a dark corner. But on the other hand you may have number of rays, each of them insufficient, but all converging and brought to bear upon the same point, and when united, producing a body of illumination which will clear away the darkness which you are endeavouring to dispel.*

In other words, *circumstantial evidence consists of this: that when you look at all the surrounding circumstances, you find such a series of undersigned, unexpected coincidences that, as a reasonable person, you find your judgment is compelled to one conclusion. If the circumstantial evidence is such as to fall short of that standard, if it does not satisfy that test, if it leaves gaps then it is of no use at all. As I have stated this case depends entirely upon circumstantial evidence.* (Emphasis added.)

[65] In the present case, there is ample circumstantial evidence tendered in court by the prosecution where its cumulative effect had established a case against the appellants beyond a reasonable doubt. The evidence of CCTV recordings, incriminating items discovered in consequence of information from the appellants, the conduct of the appellants, the appellants were last seen with the victim and were arrested together at a house in Sungai Petani were among the strong circumstantial evidence that pointed to the guilt of both the appellants.

[66] The DNA and fingerprint evidence are only corroborative evidence and its absence would not affect the prosecution's case if there is other evidence to establish its case as in the present case. We also do not find that the available circumstantial evidence is in favour of the first appellant's innocence as contended by counsel for the first appellant based on the reasons mentioned earlier.

[67] As such, we agree with the trial judge that the circumstantial evidence in this case, has proved the case for the prosecution against the appellants, and therefore, the appellants' contention on this issue is untenable.

The issue that the first appellant has no duty to save the victim

[68] As regards this issue, counsel for the first appellant submitted that the first appellant did not owe any legal duty to save the victim. It was argued that

the first appellant's omission to save the victim and to report the incident to the police does not make her criminally liable for the robbery and murder of the victim.

[69] On this issue, the charge against the appellants was for the offence of murder with the common intention of both of them. What is important is the prosecution has established its case against both appellants based on the strong circumstantial evidence as discussed earlier. The omission to report to the police or take any action to save the victim would only add another piece of circumstantial evidence against the first appellant as that would be the reasonable action to be taken unless the first appellant participated in the said offence as proven in this case.

[70] Therefore, the issue raised by the first appellant does not have any material weight that affects the prosecution's case.

The issue that trial judge erred in making material inferences and presumptions that were in favour of the prosecution and failed to give the benefit of the doubt to the first appellant

[71] Here, counsel for the first appellant submitted that the trial judge had wrongly drawn many material inferences and presumptions favourable to the prosecution while neglecting the benefit of the doubt to the accused.

[72] The favourable inferences to the prosecution made by the trial judge are the first appellant unplugged the CCTV decoder from house No 2 and took it away, the tight tying of the victim is to prevent her from freeing herself and shouting for help, the seizure of the same motorcycle in Sungai Petani that was used in the incident and the place of seizure was the place both the appellants were cohabiting, the story of faulty hose and the first appellant was living at Taiping Garden were not advanced at the prosecution's case, the first appellant facilitated the murder and the first appellant cannot be cohabiting with the second appellant without knowing him for some time.

[73] Having considered the evidence in totality, we are of the view that the inferences made by the trial judge were reasonable and logical. The inferences were made based on the proven facts in this case.

[74] In this regard, it is also useful to refer to the Federal Court case of *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 which states as follows:

> [12] After the amendments to ss 173(f) and 180 of the CPC, the statutory test has been altered. What is required of a Subordinate Court and the High Court under the amended sections is to call for the defence when it is satisfied that a prima facie

case has been made out at the close of the prosecution case. *This requires the court to undertake a maximum evaluation of the prosecution evidence when deciding whether to call on the accused to enter upon his or her defence. It involves an assessment of the credibility of the witnesses called by the prosecution and the drawing of inferences admitted by the prosecution evidence. Thus, if the prosecution evidence admits of two or more infere nces , one of whic h is in the a c cuse d's fav our, then it is the duty of the court to draw the inference that is favourable to the accused*. See, *Tai Chai Keh v Public Prosecutor* [1948–49] MLJ Supp 105; *Public Prosecutor v Kasmin bin Soeb* [1974] 1 MLJ 230 ... (Emphasis added.)

[75] Likewise in the present case, based on the evidence before the court, the trial judge has made inferences that were in favour of the prosecution. There were no two or more inferences that can reasonably be made from the proven facts in this case and as such, the inferences in favour of the first appellant do not arise.

The issue that the trial judge has failed to consider the unsworn statement of the second accused

[76] After having read the grounds of judgment of the trial judge, we find that the contention of the counsel for the second appellant was without basis. The trial judge did consider the unsworn statement of the second appellant in sufficient detail. In the grounds of judgment, it states, inter alia, as follows:

Defence of Murugan

Murugan, the second accused, states from the dock in his written unsworn statement that he does not know the first accused, Kagatree at all, he is not associated with her at all and he is not involved in the commission of the crime.

He states further that he was not present at the scene of the crime, as he was all the while at Sungai Petani, wandering around to look for a job. In effect, he is raising the defence of alibi, albeit without a notice under s 402A of the CPC.

His defence of alibi goes hand in hand with the defence of Kagatree, that it was not Murugan who had entered house No 19 and manhandled the deceased victim but Raja. This defence advanced by Murugan, is also an afterthought and a recent invention, as it was not advanced during the case of the prosecution, via SP16.

...

[68] *Having considered the whole evidence adduced, including the unsworn statement from the dock by the second accused,* am satisfied that in view of the concocted story by both the accused persons, in order to exonerate and exculpate themselves from criminal liability juxtaposed with the credible evidence of the prosecution, which stays intact, the defence is unworthy of any credence. Further, the defence has failed to raise any reasonable doubt as to the truth of the prosecution case or as to the accused persons' guilt for the reasons that I have considered earlier ... (Emphasis added.)

A CONCLUSION

[77] Based on the aforesaid reasons, we unanimously find that the conviction of both appellants on the charge of murder punishable under s 302 of the Penal Code is safe. Hence, the appellants' appeal is dismissed and the conviction and sentence by the High Court are affirmed.

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Appeal dismissed.

Reported by Nabilah Syahida Abdullah Salleh

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